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ABSTRACT

The student-oriented newsletter provides learning activities, background information, resources, teaching techniques, case studies, and other sources to help high school teachers develop, plan, and implement a course on the Supreme Court in a legal education program. The first chapter examines the role of the Supreme Court in American life, selected cases decided by the Court in 1975-76, and methods used by the justices in considering issues. The second chapter discusses the death penalty as a legal concern and presents arguments in favor of and against the death penalty. A death sentencing simulation is presented in the third chapter, followed by description of fair trial procedures in the fourth chapter. Exercises for understanding the Right to Privacy as guaranteed by the Bill of Rights are incorporated into chapter five. A self-incrimination game is described in chapter six, followed by three case studies and background information on abortion in chapter seven. The last chapter describes cases related to libel and slander and gives instructions for setting up a moot court. A coupon for ordering back issues of law-related newsletters and student materials is included. (Author/DB)

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NOVEMBER 1976

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Supreme Court Highlights

The Supreme Court: What's Your Opinion?

The items which follow are intended to stimulate your thinking about politics and your role as a citizen. After everyone in your class has responded to all of the statements, compare your answers in small groups of four to six. After you have done so, discuss, in general, what the results tend to show about your group. Compare your group's position with the rest of the class. Can you generalize about your attitudes toward the Court and the issues? Do you think the results are typical of your age group, your community, the nation as a whole? If there are wide differences between members of your class, what explains them?

You might like to give the survey to your parents, neighbors, or other teachers to find out if they respond to the items in the same manner or differently than your group did. If you do such a survey, be sure to keep the individual results anonymous to protect the privacy of each individual.

In front of each item place the letters that indicate the extent to which you agree or disagree with the statement.
SA — Strongly Agree A — Agree U — Uncertain D — Disagree SD — Strongly Disagree

_____ 1. A person's background and personal habits should not influence the decisions of any court regarding his/her individual rights.

_____ 2. The Supreme Court should consider public opinion as well as the law when it makes a decision.

_____ 3. The death penalty can help to reduce crime and should be considered fair treatment and constitutional for certain crimes.

_____ 4. The press should have a right to print information about any criminal act both before and during a trial. After all, the public has a right to know what's happening.

_____ 5. The government should not have the right to tape record anyone's private conservation at any time for any reason. If they did, everyone would need to fear the government.

_____ 6. Personal business papers of all kinds are just as private as a conversation and should not be used to charge an individual with a crime.

_____ 7. If a minor becomes pregnant, she should only be able to have an abortion with the permission of her parents.

_____ 8. If a wife becomes pregnant, she should only be able to have an abortion if her husband agrees.

_____ 9. Legal abortion is legalized murder and should not be considered a constitutional right under any circumstances.

_____ 10. Information about individuals' arrest records or court appearances should be kept private to avoid damaging their reputation.

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Four issues of the Bill of Rights In Action will be published each school year in September, November, February and April. Subscription price, four issues, $4.00. Class sets of 35, $10.00 each issue.
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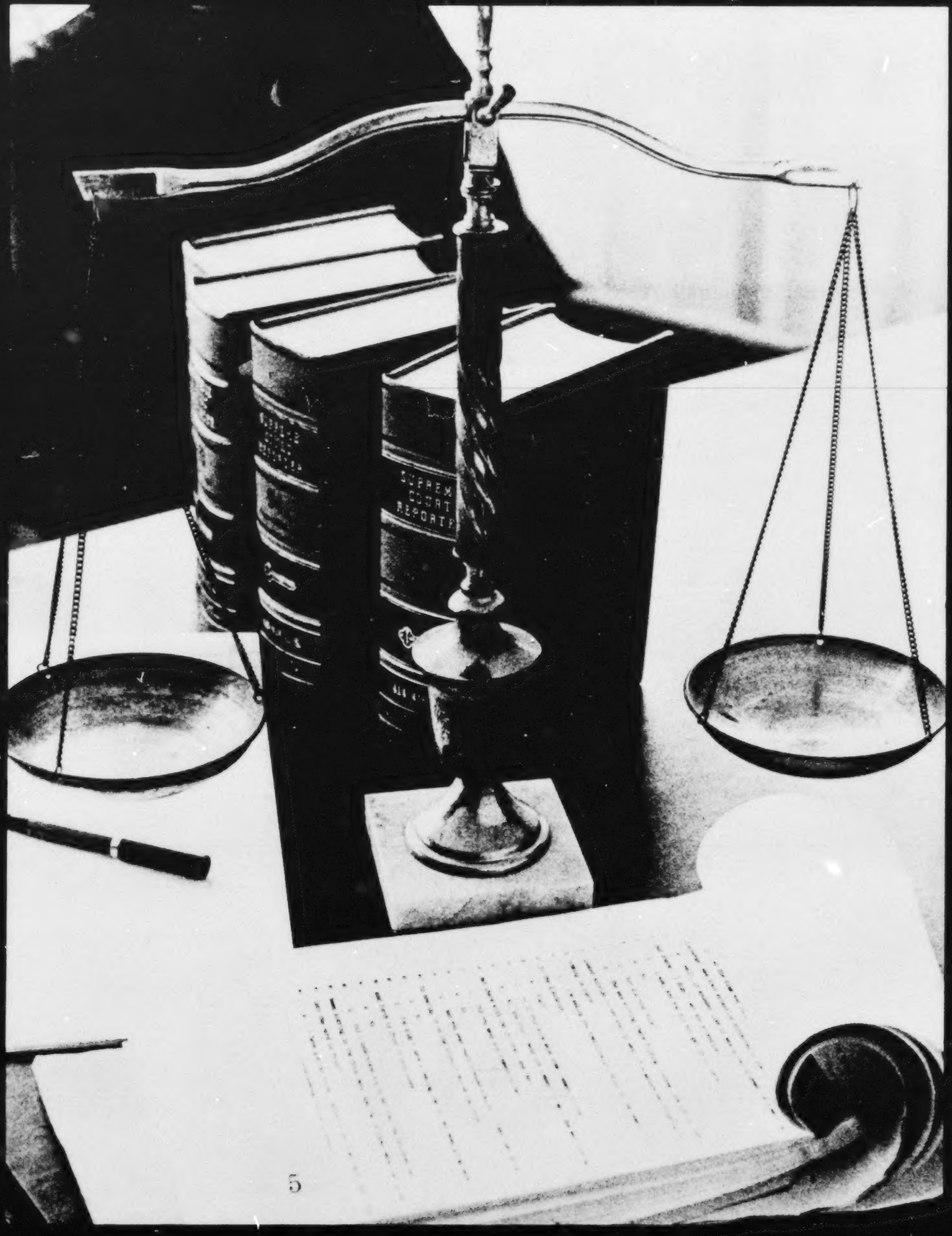

SUPREME
COURT
REPORTER

The Supreme Court and American Life

Many Americans are concerned because a large percentage of the population does not trust the government. Faith in the President, Congress and politicians in general is very low.

It is no doubt true that a total loss of faith in the American political system could lead to the destruction of the system, in an extreme case even to civil war and a violent change in our form of government. On the other hand, the Founding Fathers, if they are watching our progress, might be relieved and happy to see that many Americans *are* suspicious of their leaders and the power of the government. When the Constitution was written, one of the greatest dangers feared in the new system was the power of the federal government. The elaborate checks and balances between the power of the federal government, its three branches and the states were established to reduce the danger that a tyrant, by controlling the central government, could use power to eliminate opposition and destroy the Republic.

To further reduce the danger of tyranny by the state against individual citizens or the destruction of basic freedoms such as that of the press, the Bill of Rights was added to the Constitution. These ten amendments, augmented over the years by many others, extend and support individual rights and guarantee fair treatment for the person in our society. Contained in the amendments are basic principles necessary to guarantee freedom from the power of the state and the majority.

So far this all sounds abstract and dry. To take on meaning the principles must be applied to people, individuals whose freedom may be threatened by the government. In American society, when an individual believes his rights under the Constitution have been violated, it is possible, although neither easy nor inexpensive, to challenge the alleged violation by appealing court decisions all the way to the United States Supreme Court. At every step in the process the courts consider the circumstances of these conflicts which concern not only the rights of those involved but the rights of us all.

Cases To Decide

Suppose we examine the facts in several cases. Read the short paragraphs which follow. How do you believe the Supreme Court should decide each case?

1. David Harding is brought to trial and convicted for molesting several small children. After his lawyer withdraws from the case, Harding hires another to appeal the verdict by asking for a new trial. His new lawyer needs a complete copy of the trial record which would cost several hundred dollars. Since Harding can't afford to pay for the transcript, his lawyer asks the court for a free one. *The request is denied.*
2. A theatre manager, known to be a homosexual, shows a foreign movie which is considered to be an art film. However, some people think it is obscene and complain to the authorities, who arrest and bring the theatre manager to court. *He is found guilty, fined, and jailed for possessing and exhibiting an obscene film.*
3. Three men in a car are stopped by the police because of a broken headlight. The police recognize the men as constant troublemakers with police records, and therefore decide to search the car. In the trunk the police find some ducks that have been shot out of season. *The men are arrested and fined heavily for hunting out of season.*
4. An ad in a newspaper severely criticizes the actions of James More, an office-holding politician with a bad reputation in the community. The ad contains some false statements about these actions. Moore sues the newspaper for libel, saying that his reputation has been damaged. *The jury agrees with Moore and orders the newspaper to pay him damages.*
5. A group of Communist Party leaders is arrested for conspiring to advocate the violent overthrow of the government. Although the accused produce financial records showing that they cannot raise the money, *the judge sets bail at $50,000 each to prevent the Communists from "jumping bail" and leaving the country.*
6. David Harding is brought to trial and convicted of robbery. After his lawyer withdraws from the case, Harding hires another to appeal the verdict by asking for a new trial. His new lawyer needs a complete copy of the trial record which would cost several hundred dollars. Since Harding can't afford to pay for the transcript, his lawyer asks the court for a free one. *The request is denied.*
7. A threatre manager shows a foreign film which is considered to be an art film. However, some people think it is obscene and complain to the authorities, who arrest and bring the manager to court. *He is fined and jailed for possing and exhibiting an obscene film.*
8. Three men in a car are stopped by the police because of a broken headlight. While the car is stopped, the police decide to search the car. In the trunk the police find some ducks that have been shot out of season. *The men are arrested and fined heavily for hunting out of season.*
9. An ad in a newspaper severely criticizes the actions of James Moore, a public official with a good reputation in the community. The ad contains some false statements

about these actions. Moore sues the newspaper for libel, saying that his reputation has been damaged. *The jury agrees with Moore and orders the newspaper to pay him damages.*

10. A group of executives in some large corporations are arrested for conspiring to fix the prices and for providing faulty equipment in some government contracts. Although the accused produce financial records showing that they cannot raise the money, *the judge sets bail at $50,000 each to prevent the businessmen from "jumping bail" and leaving the country.*

What are the differences between the first and the second five cases? Did you decide any of the second five differently than the first five? Why?

The questions were used as a part of a study by Reed College Sociologist John Pock. The purpose of the research was to determine the attitudes toward civil liberties held by seniors in a group of Oregon high schools. We have used only a few of the questions. Pock discovered that the students were influenced by the personal and social attributes of the people described in the incidents. Were you? Did words such as homosexual, Communist, troublemaker affect the way in which you responded to each case? Do you believe such factors should influence the decision of a court?

The Pock Study and perhaps your reaction to the questions illustrate a problem of continuing importance regarding liberties guaranteed by the Constitution and Bill of Rights. Frequently, those who feel denied their rights and who take their cases to the United States Supreme Court often are not people who are from social or individual backgrounds that a majority of Americans believe are desirable. Blacks, athiests, known criminals, Communists, all are minorities or undesirables to many Americans. When decisions favoring such groups or individuals are handed down, many Americans object. Should personal background or group membership influence our courts when they interpret the Bill of Rights? Their decisions can guarantee fair treatment for all citizens.

Supreme Court

When cases are appealed to the Supreme Court, how do the justices consider the issue that is raised?

Principles of law drawn from the Constitution and the Bill of Rights are applied to cases which come before the court. Decisions in earlier cases are carefully studied and applied. New information based on social scientific research may be presented. Changing values and behavior patterns in society may be considered.

All of this data is examined by the nine justices. Their conclusions are influenced by personal, legal, social, political and economic biases. All members of the court are lawyers, but before their appointment, some were politicians, other judges or law professors, still others attorneys with successful careers as advocates. Court appointments have often been based on the desire of the president in office to influence the kinds of decisions handed down by the majority. Occasionally, presidents have been disappointed to discover that the previous record of an appointee does not always predict the kinds of opinions that he will write. More often, justices are consistent and follow a liberal, moderate or conservative course throughout their careers.

As a result of the views of its members, the majority position of the Court changes over time. On the present Court, a conservative group of justices, most appointed by President Nixon, are attempting to reduce the extent to which the Court takes activist positions on many issues.

The law is not absolute in our system of government. It is important that Americans understand that a part of the genius of our system is its flexibility. If there were no room for interpretation and change in the application of our law, the past might well be a record of outbursts of violence caused by groups denied fair treatment by an inflexible system. To be sure, such contemporary issues as busing and abortion illustrate that there are groups whose outrage at court decisions viewed as too radical can also be disruptive and unsettling to society.

The cases discussed in this issue are only a small percentage of the total decided during the 1975-76 term of the Supreme Court. They were selected because they deal with issues of importance to all Americans. The death penalty, pre-trial publicity, privacy, abortion and the right to protect one's reputation from unfair public abuse are discussed through cases decided by the Court. Both majority and minority opinions are examined. Activities and discussion questions are included to stimulate analysis and debate on each case. Through a consideration of these materials, it is our hope that you will better understand the process by which the Court works as well as the dynamic quality of the American legal system.

"YOU MEAN THESE APPLY TO THE RIFFRAFF TOO?"

From *The Herblock Gallery*, Simon & Schuster, 1968.

D E A T H P E N A L T Y

"Capital punishment," more commonly referred to as the death penalty, involves the government execution of people who are convicted of such crimes as murder or treason. *Capital* comes from a Latin word, *capita*, meaning head. In ancient times, capital punishment was often carried out by the state executioner who beheaded the convicted person. Other methods of capital punishment include death by shooting, hanging, electrocuting and gassing.

Capital punishment is an old custom. It has been used in ancient and modern societies. Most western countries in the world today, however, have stopped using capital punishment. Canada, France and the United States are the main exceptions.

Within the United States the use of capital punishment varies from state to state. However, once a person has been sentenced to death, practices are usually quite similar. A person who is sentenced to die for committing a crime is usually kept in a special section of a prison reserved for inmates who are to be executed. This section is known as "death row." As of July, 1976, 602 men and women were living on Death Rows across the country awaiting their death.

Usually, the prisoners on death row have little contact with other prisoners. Each occupies a small cell alone. Death row prisoners cannot see the other inmates and often take their meals and exercise alone. This life may continue for many months and even years as the person awaiting execution appeals his or her case to the courts, or simply waits for the sentence to be carried out.

The most common methods for executing people in the United States, who have been sentenced to death, are through electrocution and gassing. It is contended that these are the most painless and humane methods, although some observers dispute this claim.

In California the gas chamber is used. It is a large, steel cell with windows on three sides. The cell can be closed so that it is airtight. Once the convict is strapped into one of the two chairs in the cell a cyanide pellet is released into a mixture of sulfuric acid and water located under the chair. As the pellet dissolves, a deadly vapor of cyanide gas escapes and fills the cell. After breathing this gas for about twenty seconds, a person loses consciousness. It takes up to fifteen minutes for the person to die.

Use of the Death Penalty

In earlier times, the death penalty was used to punish people for committing many different offenses including picking pockets or stealing a loaf of bread, as well as for committing murder and treason. During the 1800's in England, for example, there were 270 capital offenses or crimes punishable by death. During this same time period, the United States also had a large number of crimes punishable by death. Gradually, however, public protest and demand for reform reduced the number of capital offenses in both countries to no more than fifteen, with most of these offenses involving some kind of first degree murder . . . killing with malice and intent.

Historically, each state within the U.S. has had the power to make its own laws regarding the use of capital punishment. In over ten states, capital punishment does not exist. Other states require the death penalty only for certain kinds of murders.

States that have capital punishment as a penalty must have a legally defined standard for deciding when capital punishment shall be administered. That is, they must clearly state in the law under what conditions and in what situations the death penalty will be used. Usually, a sentence of death carries with it an automatic right to appeal.

Questions for Discussion

1. Why do you think the death penalty was originated?
2. Why do you think most western countries have abolished it? Why has the United States kept it?
3. What kind of crimes do you think deserve carrying a penalty of death with them?

The Argument Reaches The Supreme Court

During its recent 1975-76 term, the U.S. Supreme Court was asked to decide whether the *methods* several states used for deciding who would be sentenced to death were constitutional. More specifically, the Supreme Court had to decide if the death penalty laws of certain states violated the Eighth Amendment's provision against "cruel and unusual" punishment, and the Fourteenth Amendment's guarantee of "due process of law." In addition, the justices heard arguments about whether capital punishment itself was unconstitutional.

The cases which reached the Supreme Court in 1976 had come about as a result of the Court's 1972 decision in the case of *Furman vs. Georgia*. In the *Furman* case, the Court considered a *method* in which the death penalty was mandatory, was automatically given, in all first degree murder convictions *unless* the jury recommended life imprisonment. The Court ruled that this *method* was unconstitutional since the jury had no rules to go by in making their decision. This made their decision *arbitrary*, said the Court, and therefore unconstitutional. It violated both the Eighth and Fourteenth Amendments. However, a majority of the Court did *not* rule that capital punishment itself was unconstitutional.

Thirty-six states changed their laws on capital punishment after the *Furman* decision. Each came up with a slightly different *method* for determining which convicted defendant should be executed. The series of cases which were presented to the Supreme Court on March 31, 1976, contained two basic methods which affected approximately twenty five states.

In the first type of statute, every defendant who was convicted of a capital offense was automatically sentenced to death. The laws did not give the jurors any choice at all about the penalty, even if they felt the defendant deserved life im-

prisonment rather than the death penalty. The two cases which involved this type of statute came from Louisiana and from North Carolina.

In the second type of statute, after finding a defendant guilty of first degree murder the jury was told to consider everything about the defendant and the crime. This included both the *aggravating circumstances*, or those things which made the crime horrible or vicious, such as a long prior record of the defendant, a lack of sorrow on the part of the defendant, or a particularly ugly type of crime, and the *mitigating circumstances*, or those which called for mercy on the part of the jury. Mitigating circumstances were either listed in the statutes, or left entirely to the jurors' discretion, depending on the state. Examples of these circumstances which seem to make the defendant or the crime less terrible or more understandable, are the absence of any criminal record of the defendant, the fact that the defendant is young, and extremely sorry he or she ever committed the crime, and the fact that he or she may have been forced by someone or some circumstances to commit the crime.

The juries in Georgia, Florida and Texas who were bound by this type of law, were told to balance the two types of circumstances against each other, and to recommend the death penalty only if the *aggravating circumstances* outweighed the *mitigating* circumstances.

Questions for Understanding

1. How do these statutes differ from the one overturned in the *Furman* case?

2. Do you think either type of statutes prevents capital punishment from being "cruel and unusual"?

3. Do you think either type prevents an "arbitrary" decision?

Consider These Arguments

When the Supreme Court listened to the arguments of both sides, the justices found themselves in one of the most crucial and complicated legal battles of the century. The chart below summarizes the arguments they heard. Read them over and decide which you agree with.

Arguments in Favor of the Death Penalty	Arguments Against the Death Penalty
1. The existence of capital punishment keeps people from committing serious crimes. It is hard to say how well this "deterrent effect" works, but because legislatures in many states have studied the problem and decided that it does work, the Supreme Court must agree with them.	1. Capital punishment has *no* deterrent effect. In states which have abolished the death penalty murder rates have declined or remained the same. Most people who commit crimes do not believe they will be caught, while many others *want* to be punished. These people will not be deterred.
2. If a person takes anothers life, he should pay for the act by giving up his or her own life. "An eye for an eye and a tooth for a tooth." This is in accordance with the *punishment* purpose of the criminal justice system.	2. Capital punishment is a wrongdoing on top of a wrongdoing. It does not help the victim of the original crime, causes loss to the family of the accused, and embarrasses all civilized people. Besides, locking a criminal up for the rest of his or her life is punishment enough.
3. Capital punishment is in accordance with "due process of law." It is reserved for only the most serious crimes. Jurors are told to consider it very carefully, and there are many steps in the appeals process.	3. Capital punishment involves so much chance and arbitrary decision-making that it is like a lottery rather than "due process of law." Chance is involved in the prosecutor's choice of which crime to charge the accused with, and whether or not to plea bargain. It comes into play in a jury's view of the defendant and the crime, in the choice of an appeals judge of whether or not to review the case, and in a governor's decision whether or not to grant clemency. This is too much chance when a person's life is at stake.
4. Some people are so bad that they cannot be rehabilitated enough to live in society. Those who have committed serious crimes should be executed to make sure they never harm anyone again.	4. Life imprisonment without chance of parole would keep criminals who could not be rehabilitated off the streets just as well as executing them would. Studies have shown that most murders are committed by people who are unlikely ever to do it again, so these are not usually the most dangerous people, but may be the *most easily* rehabilitated.
5. Capital punishment is allowed by the Bill of Rights itself. The Fifth Amendment says that no person shall be deprived "of *life*, liberty, or property without due process of law." These statutes give them "due process of law" prior to sentencing them to death.	5. Although capital punishment may not be specifically prohibited by the Constitution, customs and conditions have changed during the past 200 years. It cannot be doubted that slavery is no longer acceptable in the United States, but that was also protected by the Bill of Rights and the Constitution when they were adopted. Just as slavery is no longer acceptable, the death penalty is now considered "cruel and unusual" punishment, and should be outlawed.

The Death Game

Procedure:

Step 1. Divide the class into four groups. Each will play the role of the sentencing jury in the cases described below. Each jury will be asked to decide one of the cases first using the TYPE I capital punishment statute, which is like those in use in North Carolina and Louisiana. Then using the TYPE II statute, as do juries in Georgia, Texas, Florida and about twenty other states.

2. The defendant in each case has already been convicted of first degree murder. It is the job of each jury to determine the pnealty for each defendant.

3. Juries with TYPE I statues *must* recommend the death penalty for those convicted of first-degree murder. They have no choice to make.

4. UnderTYPE II statutes the only two choices available are life imprisonment or death.

5. When jurors apply TYPE II statues they should first make a list of the *mitigating circumstances* that is those which seem to call for mercy. Jurors should also make a list of all of the *aggravating circumstances*, or those which make the crime violent or repulsive. Jurors should then weigh or balance the *mitigating* and the *aggravating* circumstances against each other. If they feel the case calls for leniency they should recommend life imprisonment. On the otner hand, if, in the opinion of the jurors, the case is barbarous or savage, they should recommend death.

6. When each jury is finished, one member of it should make its recommendation of the proper penalty to the entire class. The recommendation does not have to be unanimous. Each law in question requires only a majority of the jury to agree on the sentence for it to be recommended.

Statutes:

TYPE I: *Anyone convicted of first degree murder shall automatically be sentenced to death.*

TYPE II: *After finding a defendant guilty of murder in the first degree, the jury shall look at the circumstances of the crime, and at the character of the individual defendant. If it finds the aggravating circumstances of the crime and the defendant outweigh the mitigating circumstances, it shall return a recommendation of the death penalty. Otherwise it shall recommend life imprisonment.*

CASE 1
NAME: LUBY WAXTON
AGE: 24
SEX: MALE

Luby has been in and out of jail ever since he was a teenager. He was convicted of shoplifting, burglary, and assault with a deadly weapon. He received a light sentence for each.

On June 3, 1974, Waxton began drinking early in the morning. He and a friend of his planned a robbery of a local grocery store to get some money. That afternoon Waxton bought a small handgun.

He and three others drove to a market. Waxton and his friend Tucker entered the store, bought some cigarettes and then announced a hold-up.

Waxton went behind the counter and emptied the cash register. He put his gun to the sales clerk's head and pulled the trigger. The clerk, an old woman, died instantly.

Waxton was convicted of robbery and murder in the first degree. (Tucker was given a lighter sentence for testifying against Waxton and the other two accomplices.)

CASE 2
NAME: JAMES WOODSON
AGE: 18
SEX: MALE

Woodson has no prior record of being arrested.

Woodson was home from college for the summer. He met Luby Waxton in the early afternoon of June 3, 1974, and he joined him in drinking.

Woodson tried to go home but Waxton and his other friends pistol whipped Woodson until he agreed to accompany them on the robbery.

Woodson remained in the getaway car when Waxton and Tucker entered the store. Woodson was carrying a rifle, but he did not shoot it during the hold-up. He watched as a man entered the store, but did not try to stop him. The man was shot once he was inside. Woodson drove the getaway car as the robbers escaped.

Woodson was convicted of robbery and first-degree murder as an accomplice of Waxton.

CASE 3
NAME: MARY DAVIS
AGE: 45
SEX: FEMALE

Although Mary has no prior criminal record, she has been in the care of a psychologist for the past six years. Mary is the mother of six children ranging in age from 8 to 20.

Mary Davis and her husband Sam went to a party at the home of a friend. Both drank heavily for several hours. Around midnight Davis saw her husband talking with a beautiful young woman. Mary accused Sam of trying to seduce the young woman, and of having many other affairs with younger women. Sam dragged Mary out of the party as fast as he could.

The Davises had a loud quarrel which was heard by their neighbors as they walked home. Once inside the house the argument continued for over an hour.

Sam struck Mary several times. Mary ran into the kitchen and grabbed a butcher knife. She warned her husband that if she ever caught him with another woman again that she would cut them both up.

CASE 3 continued

Sam had another drink of whiskey, and he threw the bottle at Mary. Mary then stabbed her husband nine times. She called the police and turned herself in immediately afterwards.

Mary Davis was convicted of first degree murder.

CASE 4

NAME: JOYCE WILLIAMS
AGE: 23
SEX: FEMALE

Joyce has no prior record.

On September 10, 1972, Joyce called the police and reported that she had been raped by a man named Gregg. She was taken down to a hospital where a doctor examined her. He said he could find no evidence of rape.

The police investigated her report and told Joyce that they could not arrest Gregg. It was dark, they said, and so Joyce could have been mistaken about the identity of the attacker. Besides, they said, Gregg had a perfect alibi for the night in question.

Joyce decided to teach Gregg a lesson. She waited around the corner where he first attacked her. When Gregg approached, she told him that she was looking for him, and was glad to see him. She suggested that they go somewhere for a drink. They got into her car, drove to a secluded spot, and she shot him six times.

Joyce Williams was convicted of first degree murder.

Debriefing

1. Did each jury recommend the same penalty under the TYPE II statute? If not, why not?

2. Which type of statute do you think gives a defendant greater "due process of law"? Why?

3. Do you think either statute makes capital punishment "cruel and unusual" punishment? . . . an arbitrary decision? Which one(s)?

4. Which statute do you think is a better one? Why?

5. One of the aims of the death penalty is to prevent other people from ever committing crimes due to the fear of being executed. That is the so-called deterrent effect. Which of the two statutes, if any, do you think has a greater deterrent effect?

6. Which type of statute do you think your state should have regarding capital punishment? Go to a library and look up the type of death penalty law your state has, if it has one at all.

7. Look over the arguments for and against capital punishment. Which do you agree with? Which side do you think has better arguments?

8. Do you think capital punishment is "cruel and unusual" punishment?

9. Do you oppose capital punishment in all circumstances?

10. What do you think the Supreme Court decided when the justices were faced with these same questions?

On July 2, 1976, the Supreme Court upheld the death penalty as a punishment for murder.

By a 7 to 2 vote, the Court ruled that because the death penalty was accepted by such a large number of Americans it could not be considered "cruel and unusual" punishment. Justice Potter Stewart, writing for the majority, said that it was the only appropriate way to deal with those who commit especially hideous crimes. Although there was no opinion upon which a majority of the justices could agree, the most popular one stated was that while capital punishment was basically acceptable, some of the ways states use to decide who should be executed were unconstitutional.

Three justices said that anyone sentenced to die should have had the punishment decided by a judge or jury who considered *all* of the factors involved that might call for leniency as well as those which called for the execution. "The fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense," wrote Justice Stewart for himself and Justices Stevens and Powell.

The justices said that statutes which explain the method jurors use to decide who should die must allow them to take into account enough information to make a "rational life-and-death decision." This means that the jury must be told to consider *both* the *aggravating circumstances* which make the crime savage, and the *mitigating circumstances* which call for leniency.

The seven justice majority decided that the TYPE II statute in use in Georgia, Texas and Florida guided the jurors' choices enough to be declared constitutional. It said that the TYPE I mandatory death penalty laws of Louisiana and North Carolina did not allow for enough discretion or choice, and so they were ruled invalid. This meant that those people convicted and sentenced to death under TYPE I laws had their sentences changed from death to life imprisonment.

Justices William Brennan, Jr., and Thurgood Marshall voted to hold the death penalty unconstitutional in all circumstances.

Brennan said the court "should declare that the punishment of death, like punishment on the rack, the screw and the wheel, is no longer morally tolerable in our society." He wrote that the death penalty treats members of the human race as "nonhumans, as objects to be toyed with and discarded" which is inconsistent with all the important foundations of the Eighth Amendment.

Justice Marshall wrote that there was no evidence the death penalty was a deterrant. This, he wrote, was not even argued by the majority. Marshall said that because the penalty does not accomplish its intended result, and is such a heavy penalty, it should be unconstitutional. Furthermore, wrote Marshall, it has been so long since anyone was executed (the last execution was on June 2, 1967) that "the American people know little about the death penalty" and are not well-informed about it. Because of this, the idea that capital punishment could be upheld because it was accepted by a large percentage of Americans was ridiculous, he argued.

Do you agree with the court majority or the dissenters?

FAIR TRIAL

In every court in the United States a defendant on trial for any offense is presumed innocent until proven guilty. That is the cornerstone of our system of justice.

The Sixth Amendment to the Constitution guarantees several rights to those accused of crimes which strengthen that principle. Among those rights are the right to a *speedy* trial, to a *public* trial, and to a trial before a jury made up of the defendant's *peers*, or equals. The purpose of this amendment is also to make sure that every defendant is given a *fair* trial before an *impartial* judge or jury, regardless of who the defendant is, rich or poor, and regardless of what the crime is, misdemeanor or sensational murder.

The members of the community who ultimately make up the jury in any case must be *impartial*. They must come into the trial with an open mind. Jurors must be able to listen to the facts and arguments presented at the trial, weigh them, and decide fairly and, it is hoped, correctly on the verdict. Their verdict must be based on the facts and evidence presented *at the trial*, and not on their own personal prejudices, outside rumors, or publicity which they may have seen or heard outside the courtroom.

Pretrial Publicity and the *Gag Order*

One of the dangers of the jury system is that the members of the community might come into the trial already having been influenced by the publicity given a crime by the newspapers, radio, or television. This danger is especially present in a sensational crime. News stories about murders, bombings and the like always provide interesting reading which the media is eager to provide.

Many people fear that a great deal of publicity about a crime, the arrest of a suspect, the statements made by the suspect to the police, and the stories of the witnesses, will prejudice the entire community. If this does happen, any twelve people chosen to make up the jury would already think that the defendant was guilty of the crime. They would presume him guilty until proven innocent.

Those concerned about too much publicity of criminal cases say that community prejudice can easily arise, especially in cases where the press re-

port that the defendant has confessed to the crime. They say that even if the confession is ruled inadmissible as evidence, at the trial, the jurors will remember the fact that the press reported that the suspect confessed. It therefore becomes almost impossible for jurors not to think about an inadmissible confession while discussing the verdict.

One of the greatest continuing battles in constitutional law takes place over this issue. For while the defendant is guaranteed a *fair trial* and an *impartial jury* by the Sixth Amendment, the media and the public are guaranteed *freedom of the press* by the First Amendment.

The First Amendment's guarantee of a free press is also a cornerstone of our democracy. It is closely tied to the priceless freedom of speech. Among its many purposes are to ensure that all Americans have a free and accurate flow of ideas and information, to keep a watchful eye on any governmental abuse of power, and to make certain that no person is subject to secret arrests and trials. In effect, the freedom of the press provision also guarantees a *fair trial* to defendants because it guarantees a public trial in which the government cannot abuse its power without being criticized for it by the press and ultimately by the public.

The conflict between the right of a fair trial and freedom of the press arises when the attorneys in a case, and the judge hearing it, believe that without some form of *prior restraints*, or press censorship, it may be impossible for the defendant to get a fair trial before an impartial jury.

Gag Orders

For almost two hundred years this conflict did not arise. In fact, Court ordered restrictions on the press were unheard of until 1966. In that year, the U.S. Supreme Court reversed the murder conviction of Dr. Sam Sheppard on the ground that he had been denied his Sixth Amendment right to a trial by an impartial jury due to the conduct of the press. In that case, newspapers and radio stations carried stories demanding the defendant's arrest, labeling him a liar, reporting facts which were never testified to, and finally almost demanding Sheppard's conviction. All of this was read by the jury and, said the Supreme Court, was responsible for prejudicing them.

Since that monumental decision, judges have become more and more aware of pre-trial publicity. In the last ten years over 170 orders which prohibit the press from printing certain facts about particularly sensational cases, known as "gag orders," have been issued at the request of the parties to the cases.

The legality of these gag orders, however, had never been determined until the Nebraska Press Association (NPA) went before the Supreme Court in April, 1976. The NPA argued that its First Amendment right to freedom of the press had been directly violated by a small town judge's gag order placed on newspapers covering a sensational Nebraska mass murder trial. The case arose out of the murder and rape of six members of a family. The defendant confessed to the crime to members of his family twice before being turned over to authorities. The local judge felt that it would be impossible for the accused to get a fair trial in such a small community if the press was allowed to print the full details of the crime, the investigation, and the trial. To prevent the community from becoming prejudiced, the judge imposed a gag order which ordered the press not to print anything about:

- the identities of the victims;
- the nature of the crime;
- the background of the suspect;
- how the suspect was arrested;
- details of his confession;
- whether or not he had a prior criminal record;
- testimony of the coroner given at the open hearing.

The NPA argued that the judge was wrong in forbidding this. The judge and the defendant argued that the restrictions were both necessary and reasonable.

Questions for Discussion

1. Do you think a gag order was necessary in the Nebraska case?

2. Do you think the judge was right in including all of the items he did in his order?

3. Bring in 2 or 3 newspaper clippings which follow some crime in your city or state. Are they fair to the defendant? Do you think they influence you? Do you think they influence the public so much that the defendant will not be able to receive a fair trial?

4. Think about the Patty Hearst case. What effect do you think the publicity had on her trial in San Francisco? Had you formed an opinion as to her guilt or innocence prior to hearing all of the evidence at her trial? Do you think she received her Sixth Amendment right to an impartial jury in spite of the pre-trial publicity? Why do you think the judge in the Patty Hearst case failed to impose a gag order on the proceedings? Was there anything else he could do?

5. Do you think Richard Nixon could have received a fair trial before an impartial jury after he had resigned if he had been charged with obstruction of justice?

6. Do you think the Sixth Amendment's *fair trial* guarantee or the First Amendment's *free press* guarantee is more important? Do you think they can both exist without harming the other?

Gag Orders or Free Press:

Read the arguments that follow.
Check the ones you think are best.
Select those that you think the U.S. Supreme Court might have included in their recent decision on this issue.

1. "Freedom of the press is a more important right than that of the Sixth Amendment. It is more important to safeguard democracy by ensuring free flow of information than to guarantee any individual a publicity-free trial. Thus, all gag orders are unconstitutional."

2. "The Sixth Amendment guarantee of a *fair trial* is more important than allowing prejudicial pre-trial publicity to flow in an unchecked manner. Since a person's liberty, and even his life, may be involved when he or she is on trial, some form of control over the press is sometimes necessary. The trial court judge should have the right to protect the defendant's right to receive a trial before an impartial jury. Thus, when it is necessary a judge should be able to place reasonable restrictions on the press."

3. "Pre-trial publicity is a tool to be used by each side in a trial. The police always use it when a suspect is arrested. The defense must therefore be allowed to use it to help the defendant by counteracting the bad impression made by the information released by the police and prosecutor's office. Gag orders should be declared unconstitutional because they violate the defendant's *Sixth Amendment* right to a jury which has heard both sides before the trial rather than just the prosecution's."

4. "Pre-trial publicity does not prevent a defendant from obtaining a fair trial. In the first place people are not affected by such publicity to any great degree. Secondly, each side can question the possible jurors closely before the trial to see if they are prejudiced, and dismiss them if that is the case. Thus, the First Amendment and the Sixth Amendment can coexist without harming each other. Gag orders are, therefore, not needed to ensure a fair trial and should be declared unlawful."

5. "There are times when pre-trial publicity may influence the community in a way that may prevent the defendant from getting a fair trial. In such cases, the judge should first try to use methods which do not violate the First Amendment. This could be done by moving the trial to another locality, by delaying the trial until the impact of the publicity had died down, or by having the jurors *sequestered* during the trial. Sequestering a jury means that the jurors are separated from the community during the trial by requiring them to sleep in hotel rooms and eat in restaurants under constant guard, and by preventing them from hearing or reading anything about the trial. Only after those methods have been used and have failed should the judge order the press not to print certain facts about the crime, defendant, or investigation. Even then, the judge should only prevent the press from publicizing facts which point directly at the guilt of the defendant or prejudice the jurors against him or her, such as a confession or prior criminal record."

Questions for Discussion

1. Which position do you think is the best one? Why?

2. Do you think a defense lawyer's choice might be different from a reporter's? . . . . a judge's? . . . . a Supreme Court Justice's?

3. Which do you think the individuals listed in Number 2 above would have chosen? Why do you think they might each choose different ones?

4. Write a statement which more accurately reflects your own opinion of gag orders.

Nebraska Press Association vs. Stuart 96 S.Ct. . . . (1976)

The U.S. Supreme Court, in a unanimous ruling, said that the gag order placed on the press during and before a sensational mass murder trial in Nebraska was unconstitutional. The majority in the case said that the order was unlawful because the trial judge placed the restrictions on the First Amendment freedom of the press *before* he tried other less severe means such as delaying the trial, or moving it, or *sequestering* the jury.

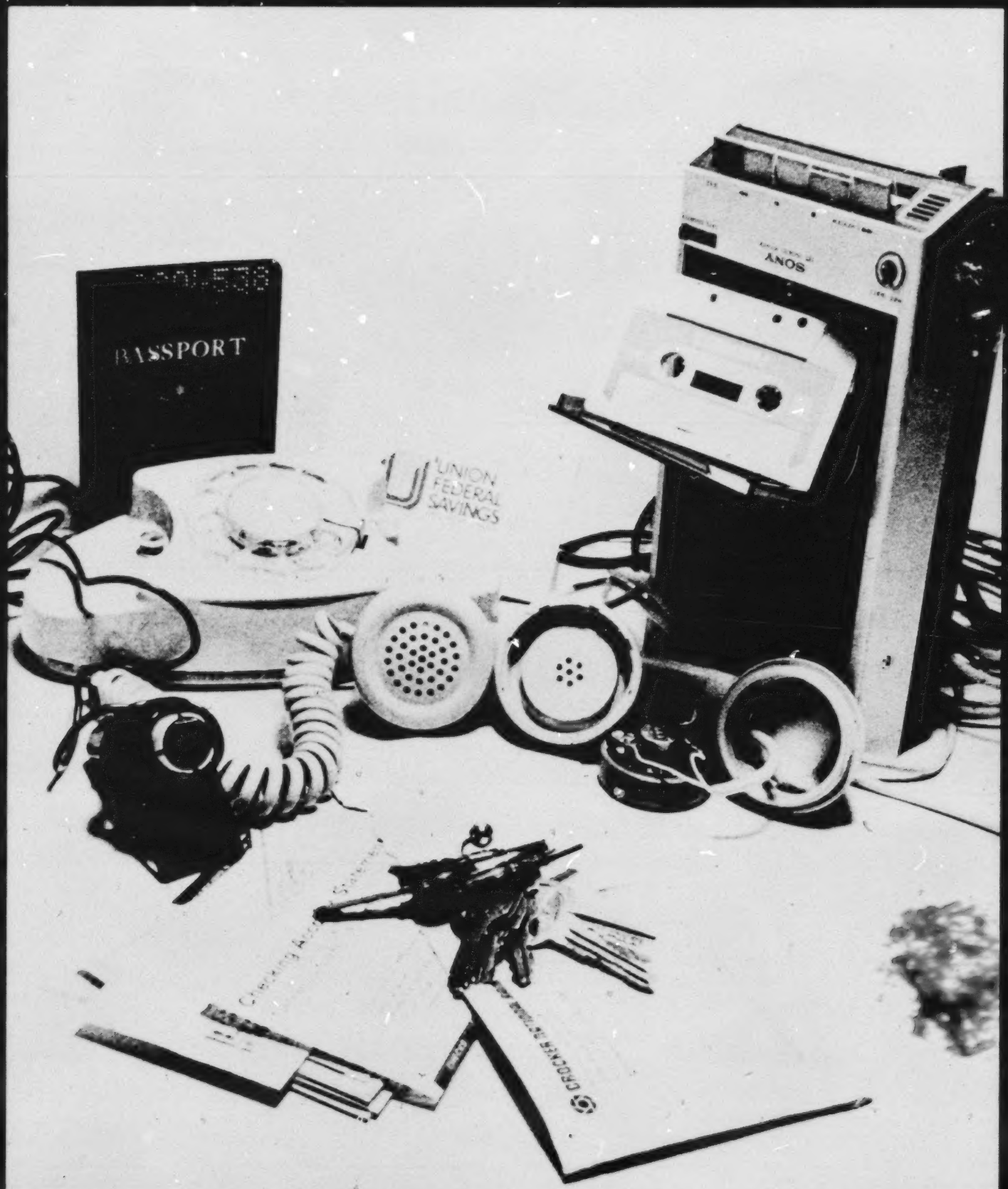
The Justices did not say whether they thought the First or the Sixth Amendment was more important. They also refused to say under what circumstances a gag order would be allowed, or what types of censorship would be permitted. They limited their ruling to this case by saying the order was too broad and too severe *here*, when other methods had not been tried first.

Three Justices, Marshall, Brennan and Stewart, went further and said that the Constitution barred any form of *prior restraint* or press censorship. Justice Stevens said he basically agreed with this, although he thought there might be extreme instances in which press misconduct might call for court restrictions.

Which position do you agree with?

Herblock in The Washington Post

"We Were Told They Were 'Strict Constructionists' "


PASSPORT
SONY
UNION FEDERAL SAVINGS

The Right to Privacy

The Bill of Rights was designed to limit the powers of the Federal Government. It was to do this by guaranteeing certain rights to the individual citizen which the government could not take away. The authors of the Bill of Rights were afraid that without these guarantees, the people of the United States would live in fear of their own government, just as they had before the thirteen colonies revolted against England. The authors were afraid that the civil rights of citizens would become subject to the whims of the President or of Congress.

Exercise for Understanding

Look over a copy of the first ten Amendments to the Constitution. Make a list of every right guaranteed by them. Which do you think are the most important rights?

As you read the following cases, keep the concern of the authors of the Bill of Rights in mind. Ask yourself if they were justified in having such concerns that these basic functions would be ignored by the government or even by a majority of the people who disliked some minority group.

Ask yourself what is happening to the individual's rights in just one area — the right to privacy.

Right to Privacy

One of the rights which was guaranteed to individuals by the Bill of Rights was a right to privacy against the government's invasion into entirely personal matters. The authors of the Bill of Rights were trying to prevent a country where "Big Brother" could find out everything about the citizens.

Did you find this right specifically mentioned anywhere in the Bill of Rights? While the right to privacy is not specifically spelled out, such a right has been found to exist by the Supreme Court in the words and guarantees of several of the first Ten Amendments. Can you find them? How many parts of the Bill of Rights do you think guarantee a right to be free from governmental invasions of privacy? Make a list of them.

The Supreme Court has found the right to privacy to be mentioned or hinted at in the First, Third, Fourth, Fifth and Ninth Amendments. Do you agree? Did you find others?

The Fourth Amendment

The Fourth Amendment says that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

The Supreme Court says that the Fourth Amendment guarantees individuals a reasonable right to personal privacy. Moreover, this Amendment means that the government can violate this privacy only when it is reasonable and only when the government has a search warrant. As you may know, a search warrant can only be obtained from a judge, and then only when the police officers can prove that they have a good reason, or probable cause. The problem comes when the Court is called upon to decide how far the police or other government officials can go in entering a person's zone of privacy.

Questions for Understanding and Discussion

1. How would you define the extent of the right of privacy?
2. What areas are too personal to allow the government to search them?

The Supreme Court has said that the Fourth Amendment's protection only applies to a zone over which an individual has a *reasonable expectation of privacy*. In other words, a person's "zone of privacy" is that area over which the person has a well-founded belief that he or she is safe from being overheard or subject to other governmental interference.

For example, the Court has said that a person is *not protected* by the Fourth Amendment from having his/her private conversations with others transmitted to the police by a hidden "bug" without his knowledge. The courts have ruled that in this type of situation persons do not have a reasonable expectation of privacy. This is so because the other person in the conversation could go directly to the police and report it, and the speaker could not prevent it. Because of this, the police can use an electronic transmitter, or "bug," to listen in on the conversation, without getting a search warrant, *as long as one of the participants agrees to allow it.*

On the other hand, because a person *does* have a reasonable expectation of privacy in his conversations with his attorney or priest, or when he goes to the bathroom, the police cannot

listen in or observe him in these activities without first getting a search warrant.

This past year the U.S. Supreme Court was asked to decide whether or not a person's bank account records were protected by the right of privacy. Do you think they should be? Or, do you believe that bank records are so public that the government should be able to look them over without getting a search warrant or the permission of the person to whom they belong?

United States vs. Miller 96 S.Ct. 1619 (1976)

By a 7 to 2 decision, the Supreme Court held that a bank depositor had *no* Fourth Amendment rights protecting his bank records. The Court said that there was *no legitimate expectation of privacy* in the contents of the original checks and deposit slips. These documents, said the Court, were not confidential communications, but were used like money in public, commercial transactions. Since there was no reasonable expectation of privacy in these transactions, there was no Fourth Amendment protection.

The Court ruled that the Fourth Amendment does not prohibit the government from obtaining information which was revealed to a third party and sent by him to the government just as in a "bugged" conversation. Justice Powell, writing for the majority, said this is so even if the information is revealed originally only on the assurance that it will be used for a limited purpose and that the confidence placed in the third party will not be betrayed.

Justices Brennan and Marshall dissented. They felt that the customer of the bank did have a reasonable expectation of privacy in his or her bank account records. They wrote that the customer's right of privacy could not be given away by the bank's voluntary decision to allow the government agents to examine the *customer's* records. The dissenting opinion stated that the bank could not give its customers' right to privacy away. "For the government to examine the records, wrote Brennan, "it would either have to have a search warrant or get the personal consent of the customer."

The Fifth Amendment

The Fifth Amendment says that "No person . . . shall be compelled in any criminal case to be a witness against himself." This provision is known as the privilege against self-incrimination. It guarantees that no defendant need answer any question if the answer can be used to damage his or her case, or put the blame on him or her. The privilege applies whenever the defendant or suspect is asked such a question, whether it is by a police officer, a grand jury, a prosecutor, or a judge.

One of the reasons for the protection against self-incrimination is that of the right to privacy. It was thought to be an intolerable act for the government to invade the inner thoughts and privacy of the individual. To prevent this from happening, the privilege against self-incrimination was written.

In a number of rulings, the Supreme Court has limited the coverage of the Fifth Amendment's self-incrimination protection to those actions which have three characteristics:

(1) The act must be *compelled* or forced upon the suspect by the government through either physical or psychological means. Beating a suspect, locking one up until he/she answers a question, and brainwashing are all types of physical or psychological *compulsion.*

(2) The act must be in the form of *testimony* or *communication.* In other words, the government must compel the accused to *talk* or *write* something which will reveal information. This is different from providing the officers with "real or physical evidence." This latter category includes acts such as being fingerprinted, being photographed, appearing in court, and other activities where the accused does nothing but give others the opportunity to observe and test his characteristics, and to use those observations as a basis for other tests. All these acts do *not* violate the protection against self-incrimination.

(3) The act or statement must be *self-incriminating.* It must point to the accused in some way, or lead to other evidence which could point in the same directions.

From *The Herblock Gallery*, Simon & Schuster, 1968.

The Self-Incrimination Game

Below are a series of situations on which the Supreme Court has been asked to rule in the recent past. For each one check off in the appropriate column whether you think the actions should be protected by the Fifth Amendment right against self-incrimination. Remember, each must be *compelled* rather than voluntary, involve some sort of testimony, and be *incriminating* to be within the Fifth Amendment's protection. All three must exist for the situation to be protected by the Fifth Amendment right against self-incrimination.

	1	2	3	4	5
Not protected by 5th Amendment					
Protected by 5th Amendment					
Self-incriminating					
Giving Testimony					
Compelled					

1. The police interrogate a suspect until he confesses.
2. The police take blood samples from someone they suspect of drunken driving.
3. The police make a suspect appear in a lineup at police headquarters wearing the clothing worn by the person who commited a crime, and they allow the victim to observe it.
4. The Internal Revenue Service gets a subpoena ordering a suspect to turn over to them incriminating papers prepared by his accountant.
5. The police get a search warrant allowing them to look through a suspect's personal business papers which contain incriminating material.

Supreme Court Rulings

The U.S. Supreme Court has ruled as follows:

1. Oral confessions and testimony which the police coerce from a suspect during interrogation, *are* protected by the Fifth Amendment's privilege against self-incrimination. The *Miranda* decision recognized that they were forced testimonial and incriminating and required that each suspect be warned that his statements could be used against him or her, and that he or she had the right to remain silent.

2., 3. *Neither* of these come within the protection of the Fifth Amendment. The Court has said that even though these actions may point to a suspect's guilt, they are *real or physical evidence* and *not testimonial communications*. The Court has said that one's voice, appearance or handwriting are just voluntary means of communicating evidence, and that they cannot as such be forced out of the suspect.

4. The Supreme Court recently decided that there was *no* Fifth Amendment privilege available that would allow an individual to withhold papers prepared by his accountant when they were subpoened by the government. The Court said that the accused was not forced to *make* such papers. They were originally made voluntarily. All the defendant was asked to do was to *turn them over* to the government, and such an action was not *testimonial* and thus not protected.

In this case, *Fisher vs. United States*, 96 S.Ct. 1569 (1976), the Court said that being forced to *write*, or *say*, something which was incriminating could be within the protection of the Fifth Amendment's privilege.

5. In *Andersen vs. Maryland*, decided on June 29, 1976, the Court ruled 7 to 2 that police may seize a person's incriminating personal business papers and use them as evidence without violating the constitutional right against self-incrimination. The ruling was based on the fact that the papers were originally written *voluntarily*. The defendant was not coerced into writing them as a confession, only into *admitting* they were his. Once again, because of this, they fell outside the protection of the privilege against self-incrimination.

Discussion

1. Do you agree with any of these decisions?

2. Why do you think the Court has limited the scope of the Fifth Amendment this much?

3. What types of acts are still protected by the Fifth Amendment?

4. What is the basic difference between the protection of privacy provisions contained in the Fourth and Fifth Amendments? Does the Fourth or Fifth Amendment protect privacy more effectively? Why?

ABORTION

In a historic decision in 1973, the U.S. Supreme Court held that women had a constitutional right to obtain an abortion. The Court said that this right was based on the woman's rights to privacy and personal liberty. These rights, said the court, were not absolute because the state also had an interest in protecting the life and health of the potential mother, and at some point in protecting the potential life of the unborn child.

For this reason, the Court ruled that a state could not interfere with the woman's right to have an abortion during the *first three months* of her pregnancy. This was because the state's interest in protecting the life and health of the woman was not great enough during this period when the abortion was a relatively safe operation to overcome the interest the woman has in getting an abortion.

During the *second trimester*, or second three-month period, the Court said that a state's interests increased enough to allow it to make reasonable laws which would protect the health of the mother. This was because an abortion presented a greater danger to the woman's health at this stage than during the first trimester. The type of regulations which would be allowed at this stage were such things as requiring a licensed doctor to perform the abortion, or requiring that it be performed in a licensed hospital.

It was only in the *final three months* of a woman's pregnancy that a state could prevent the woman from ever obtaining an abortion, or that it could place criminal penalties on anyone who performed one. This was because the operation became very dangerous for the woman's health at this late stage, and also because the state's interest in the life of the fetus became major. During the last trimester, the fetus could live outside the mother's body.

In 1976 the Supreme Court was presented with three cases related to the ones which were settled in 1973, but which involved issues intentionally left unanswered by the Court at that time.

In the first 1976 case the Court had to consider a Missouri law which prevented a woman from getting an abortion during the first 12 weeks of her pregnancy unless she had the written consent of her husband (unless the operation was necessary to save the woman's life). This case also involved a section which required a minor to obtain the permission of her parents before she could get an abortion during the first 12-week period.

In the second and third cases, the Supreme Court heard arguments on a law which allowed a minor to obtain an abortion only with the consent of either her parents or that of a judge.

Read over the three cases below which resemble the three heard by the Supreme Court. In discussing them, and the questions which follow, it is important to cover both sides of the issue and listen to both sides of the arguments, in order to more fully understand the problems which the Court had to face and resolve.

Case 1:

Sally and Bill Jones, a married couple in their early twenties, discovered, much to Bill's happiness and Sally's distress, that they were going to be parents. Sally was approximately nine weeks pregnant and in good physical health. She had spent the first years of their marriage working at a job that was the best she could get. It only paid enough for the two of them to live very modestly, however, because Sally was paying for Bill's education at the same time. Bill had one remaining year of school. Their small savings were going to be used to put Sally through school as soon as Bill finished. She had long and eagerly anticipated going back to school in order to get a better job, and be a more complete person. The financial burden and time commitment of childraising would have eliminated the possibility of school for Sally. She decided she wanted an abortion. Bill, because he had a strong religious belief that life should be preserved at all costs, decided he wanted the child.

Questions for Discussion

1. What were Sally's interests in not wanting to have the child? Do you believe they were sufficient to justify having an abortion?

2. What were Bill's interests in wanting to have the child? Do you believe he should have been allowed to prevent Sally from getting an abortion?

3. What are the state's interests in forbidding Sally from obtaining an abortion? What did the two 1973 decisions of the Supreme Court say about this?

4. The State of Missouri passed a law which required the husband's consent before a married woman could obtain an elective abortion during her first twelve weeks of pregnancy. The state legislature based the law on their idea of "marriage as an institution," and on the idea that any major change in family status was a decision to be made *jointly* by both marriage partners.

When the Planned Parenthood Association of Central Missouri (PPA) challenged this law, it argued that the section was really designed to give the husband the right to absolutely prevent, or veto, his wife's abortion. This was true, PPA argued, even if the husband was not the father of the fetus. This, the lawyers argued, violated the 1973 U.S. Supreme Court ruling which prevented the state from interfering with the choice of a woman and her doctor to end her pregnancy during the first trimester.

What are the two sides of the case? Which argument do you think is stronger? Who do you think should be involved in deciding whether or not the woman should have an abortion?

Case 2:

Susie is 16 years old, unmarried and living with her parents. She discovers that she is about eight weeks pregnant. Her parents' dislike for the father of the child is far surpassed by their strong belief that abortion is murder. Susie does not want to tell her parents she is pregnant, does not want to marry, and does not want to be an unwed mother. She wants an abortion.

Questions for Discussion

1. Do you think Susie should be able to have an abortion if she is serious about it? Are her reasons sound?

2. What are the state's interests in not allowing her to get an abortion? In not allowing her to get an abortion without the consent of her parents?

3. What are the interests of Susie's parents in making Susie have the child?

4. Should Susie be able to obtain an abortion without first having to get the consent of her parents?

5. The State of Missouri felt that the decision of whether or not to have an abortion was outside the scope of a minor's ability to act in her own best interest, or in the interest of the public. The legislators felt it was similar to a minor buying firearms and liquor. Because of this, they passed a law which prevented any minor from obtaining an abortion unless she got the consent of her parents or guardian.

Planned Parenthood Associations,

on the other hand, argued that this requirement was an unreasonable interference on the part of the state in a decision which was that of the minor and her doctor alone. PPA said that it was no different from a case where a woman got married before she became 18 and wanted an abortion, or a case where a woman under the age of 18 desired any other kind of medical service for pregnancy, venereal disease or drug abuse. In those cases, argued PPA, the State of Missouri did not require parental permission prior to treatment. Furthermore, the lawyers argued, the state had no right to give the parents the ability to prevent an abortion when the Supreme Court said that it could not do so itself. After the 1973 Supreme Court decisions, a woman and her doctor were the only people who could decide whether or not she could terminate her pregnancy during the first trimester. The state could not, and its legislators could not, give the woman's parents the right to do so.

Which side of the argument do you agree with? Why?

Case 3:

The same facts as in CASE 2, except now Susie and her parents live in Massachusetts. That state has a law which says that before a minor can get an abortion she must have the consent of either her parents or, if they refuse, of a judge. The judge, according to the law, should consider whether or not the minor is mature enough to fully understand her decision, and whether her reasons for making her decision are good ones.

The intent of the Massachusetts law, according to the state, was to encourage the minor to discuss her decision with her parents and get their consent prior to allowing the minor to get an abortion. At the same time, the state's lawyers argued, the legislators made sure that a mature minor capable of making an informed decision could obtain an order permitting the abortion from a judge without unnecessary hardships or delay. She did not have to consult with her parents, or get their consent first. All she would have to show a judge was that the abortion was in her best interests.

The Massachusetts doctors who brought the case to the Supreme Court argued that this law gives the parents a veto power over the minor's desired abortion. The law does not, they argued, allow an abortion without the consent of the parents even in the case of a mature minor, or in the case of a minor unable to give her mature consent where the parents are violently opposed to the abortion, because the judge will listen to the parents and agree with them in many, if not most, cases. This is unconstitutional, the doctors argued, because it gives a judge the power to listen to and agree with the parents in a matter in which neither should have any power. The only people who rightfully should be able to decide about the abortion, the doctors argued, are the minor herself and her doctor. Any law which gives others the right to interfere with this decision during the first twelve weeks was, in their opinion, unconstitutional.

Questions for Discussion

1. Do you think CASE No. 3 is different from CASE No. 2? How so?

2. Do you think the statute in CASE No. 3 creates a "parental veto power" over the minor's decision?

3. Do you think the other procedures set up in the statute in CASE No. 3 "unduly burden" the right of a woman to seek an abortion? In other words, do you think they place too many barriers in the woman's path?

Planned Parenthood of Central Missouri vs. Danforth 96 S.Ct. (1976)

In this case the Supreme Court, in an opinion by Justice Harry Blackmun, made two important rulings.

In the first, the Court said that "a state may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." The reason for this, wrote the justice, was that "the state cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.' " The justice said that the 1973 Supreme Court decision prohibited the state from regulating or preventing abortions during the first stage. Each decision on abortion during this period, said the Court, must be left to the doctor and his patient. The right of privacy, means that the government cannot intrude into matters so fundamentally affecting a person as the decision whether to bear or have a child.

Secondly, the Court said that the parental consent requirement made necessary by the Missouri law was *unconstitutional*. The Court based this ruling on the fact that the state does not have the power to give a third party, the parents, an *absolute* veto over the decision of the doctor and his patient to end the patient's pregnancy.

While the Court did recognize that the state might have a more important interest in a case where the patient was a minor as opposed to an adult, it did not think that the state's arguments were strong enough to overcome the right of the patient to have the abortion. The Court said that providing a parent with the *absolute* power to overrule a decision made by the doctor and his minor patient to end the pregnancy would not strengthen the family unit. Similarly, a majority said it would not safeguard parental authority since the very existence of the pregnancy had probably already broken the family structure. Since those were the aims of the state, and they were insufficient to overcome the right of the woman, the law was unconstitutional.

Bellotti vs. Baird 90 S.CT. (1976)

On the same day the Missouri case was decided, the Supreme Court also ruled on the Massachusetts case which was similar to CASE No. 3. The Court did not, however, make a final decision on the statute in question. It only gave strong hints that it felt the consent requirements were different enough from that of the Missouri case to make them *constitutional*.

Justice Blackmun, again writing for the majority, said that unlike the statute in the Missouri case, the one in the *Bellotti* case did not create an *absolute* veto power of the parents over the decision of the minor woman and her doctor. Instead, the Court said, the Massachusetts statute could be looked at as merely encouraging discussion between family members. This was because the minor could always use the procedures set up by the statute which allowed her to easily and quickly go before a judge, show she was mature and had her own best interests in mind, and get his or her permission. The legislators did not even require that the minor consult with her parents before asking the judge for his permission, said the Court.

The Court sent the Massachusetts case back to the state courts for their answer because of other, procedural complications.

R E P U T A T I O N

A person's reputation is a most important asset. It is what determines how one is thought of in his or her community and profession. It also indicates whether or not a person is successful at his or her job, and whether or not he/she has many friends or enemies. Reputation can govern a person's entire life. When someone says or writes something which is false, and which damages another's reputation in his community, it can lead to serious consequences.

The states have passed laws which protect a person's reputation from being damaged by false and bitter criticism and accusations. The three most common types of acts which have been made illegal by these laws are:

- *libel*, or any statement made in *writing* which injures the reputation of a person in the community;
- *slander*, or any statement made *orally* which damages the reputation of someone in the community;
- *defamation of character*, or any statement made orally or in writing which injures a person's reputation in the community.

Libel and slander laws are generally civil in nature. They allow a person to sue for an amount of money equal to the damage supposedly done to his/her reputation in the community by the statements of the wrongdoer. It is then up to a judge or jury to decide if the statements were actually false, if they injured the person's reputation, and if so to what degree.

The right to enjoy a good reputation, which is protected by these laws, continues only so long as the person does not give it up by committing a crime or some other immoral act. Thus, if someone makes a statement that damages another's reputation, but it is not a false statement, no wrong has been committed. The person who made the statement is protected because his/her statement was truthful, and he/she should not be punished for that.

During its past term, the Supreme Court dealt with two very interesting cases dealing with reputation. The cases came about as a result of the publication and circulation of certain statements which were not true, and which damaged the reputations of individuals in their communities.

Read the facts of each case, and discuss whether or not you, as a juror, would award damages for the remarks made. Put yourself in the shoes of the plaintiff, the person originating the lawsuit, and ask yourself if your reputation had been damaged. Ask yourself if this type of statement should be allowed to be made, or if it was just an innocent remark.

The "Libel of the Parties" Case — *Time, Inc. vs. Firestone, 96 S.Ct. 958 (1976)*

In 1964, the wife of a descendant of one of America's wealthier industrial families sued her husband in a Florida court for a legal separation with alimony payments. Her husband *counterclaimed*, or sued her back, for a divorce. He claimed she was guilty of extreme cruelty and adultery. After a long trial, the court granted the divorce requested by the husband.

Part of the court's final judgement read:

> *"According to certain testimony in behalf of the defendant (husband), extramarital escapades of the plaintiff (wife) were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, on plaintiff's behalf, would indicate that defendant (her husband) was guilty of bounding from one bed partner to another with the erotic zest of a satyr. The Court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated . . . and so the marriage should be dissolved."*

The judge granted the divorce and ordered the husband to pay $3,000 per month in alimony.

Time magazine, headquartered in New York, heard about the decision. It received reports on the judgement from four sources: a wire service report, an account in the New York *Daily News*, its bureau chief in Miami, and a reporter working on a special assignment in Florida.

Based on these sources *Time* published an article which stated that the couple had been granted a divorce "on grounds of extreme cruelty and adultery . . . . The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.' "

The wife sued Time, Incorporated, for *libel*. She claimed that her reputation in her community was damaged because of false statements published by *Time*, and because the statements were circulated throughout the country. She was awarded $100,000 by a jury.

Time brought the case before the U.S. Supreme Court, claiming that its First Amendment right of freedom of the press was violated by the judgement.

Questions for Understanding

1. Compare the statement of the court judge with the excerpt from the *Time* article. Can you see why a jury thought *Time's* article was false?
2. How much do you think a good reputation is worth? Mrs. Firestone was awarded $100,000 by the Florida court.

The "Reputation Rights" Case: *Paul vs. Davis 96 S.Ct. 1155 (1976).*

Charles Davis, III, was arrested in Louisville, Kentucky, on a charge of shoplifting. He pleaded not guilty, the charge was filed away, and eventually dismissed.

Prior to the dismissal of the charges, but after his arrest, Edgar Paul, the Police Chief of Louisville, sent a flyer to about 800 merchants in the area. The flyer contained the names and pictures of "active shoplifters." On page two of the flyer was the name and picture of Charles Davis, III, the man who had been arrested but not put on trial for shoplifting.

Davis claimed that after the publication of the flyer he could not enter a store to shop without being hassled by the owners. He claimed he was almost fired from his job for the

same reason. Davis felt that his reputation had been injured by the flyer, and so he sued Police Chief Paul. However, Davis did not sue Paul for *libel* or *defamation of character*. Instead, he brought the suit in a Federal Court claiming that his constitutional rights of *liberty* and *property*, guaranteed by the Fifth and Fourteenth Amendments, had been taken away without *due process of law* by the police chief's actions. He also claimed that his right to privacy had been violated by the publication of the flyer and its disclosure of his arrest.

Questions for Understanding and Discussion:

In considering whether or not Davis should win his case, think about the following arguments he made before the Court:

- Davis charged that the actions of the defendant, the police chief, violated his constitutional right to "liberty" and to "property." Davis claimed that without *due process of law*:
- His "liberty" to enter a store to shop had been taken away from him. Davis said that after receiving the flyer with his name and picture on it, store owners automatically recognized him and thought he was an "active shoplifter."
- Davis also argued that his "property right" to a good reputation had been damaged due to the publication of the flyer. He said he might not be able to get jobs in the future because of it. Moreover, he pointed out that he was limited in the places he could go, and the things he could do.
- While this may seem to be a typical case of libel, Davis charged that since the defendant was an official of the state government, his actions served to deprive him of constitutional rights, a much more serious offense.

1. Can you think of any constitutional right which had been violated by the flyer? Should a person have a constitutional right not to be accused of a crime he has not been convicted of?

2. Do you agree that Davis' liberty to act in a constitutionally protected manner was violated by the police chief?

3. Do you agree that a person has a right to own a good reputation in the same way he has a right to own a piece of *property*, without unnecessary interference from others, including state officials?

4. Was Davis's right to privacy violated? Was this any different from a newspaper story telling all the details of his arrest? From the police chief randomly picking names out of the telephone book and including them in his flyer? Explain.

How to Organize a Moot Court

The two cases described above provide an excellent opportunity for the presentation of a classroom moot court. Different from a mock trial which can be used to role play and simulate an actual trial on the facts of the case, a moot court deals only with the interpretation of the law.

Organizing the Class

1. Divide the class into three, approximately equal-sized groups.
2. Select one of the groups to serve as the Supreme Court.
3. Divide the students in each remaining group into two teams.
4. Assign each group one of the two cases.
5. One team in each group represents:
   Mrs. Firestone
   Charles Davis III
6. The second team in each group represents *Time, Inc.*, Edgar Paul.
7. Give the teams, either as a homework assignment or as class work, time to develop the best arguments they can think of to support their position in each of the two cases.
8. Seat the Superior Court members in the front of the room, appoint one of them the Chief Justice.
9. The Chief Justice asks each team to present its oral arguments in the following order:
   Mrs. Firestone
   Time, Inc.
   Charles Davis III
   Police Chief Paul
10. During or after each team's arguments, the members of the court can and should question the attorneys closely in an effort to clarify their arguments.
11. After all arguments have been presented, the justices organize into a circle. The attorneys may sit around the circle and listen, but they cannot talk or interrupt the deliberation of the Court.
12. In the circle the justices discuss each set of arguments and make their decision on the two cases by a majority vote.
13. After the justices have made their decision the attorneys can engage in further discussion.
14. The entire class concludes the moot court by reading the actual decisions and comparing the arguments of the justices with their own.

Decisions

***Time, Inc. vs. Firestone*, 96 S.Ct. 958 (1976)**

The Supreme Court held that *Time* would have to pay the judgement. The fact that Mrs. Firestone went into a court to get a divorce, said the majority, did not give *Time, Inc.*, the right to print false information about her without properly checking it for accuracy. She was a private person, said the Court, and entitled to enjoy a good reputation.

Since she was a private person, Mrs. Firestone did not have to prove that *Time* had acted with *actual malice*, or that it purposely tried to make damaging false statements. This must be proven only in cases involving a person who "occupies a role of especial prominence in the affairs of society," according to the Court.

The Court majority wrote that the *public person-actual malice* test which gives the press some form of protection from lawsuits, does not automatically apply to reports of all court trials. Instead, the Court said, it only extended to public figures or to those who were in the "forefront of particular controversies." Once a person becomes involved in a court case, wrote Justice Rehnquist, that individual should not automatically "expose (himself) to increased risk of injury from defamatory falsehood."

***Paul vs. Davis* 96 S.Ct. 1155 (1976)**

By a 5 to 3 vote (Justice Stevens did not take part in the decision because he was appointed to the Court by President Ford after the case was argued) the U.S. Supreme Court held *against* Davis.

The Court, in an opinion by Justice William Rehnquist, said that although Davis had claimed enough to win a normal *libel* or *defamation* action in a state court, none of his federal constitutional rights had been violated.

The Court first said that a person had *no constitutional* right to enjoy a good reputation which had been changed by his own actions. Justice Rehnquist wrote that an injury to this image does not violate the individual's right to "liberty" or "property" protected by the Fifth and Fourteenth Amendments.

The Court said that the only types of interest which were included within the protection of the Constitutional rights of "liberty" and "property" were those things that were first created by state laws and then *protected* by them, such as driver's licenses and teaching credentials. The Court did not think that reputation was such a right. It said a right of reputation was not generally created by state laws. It was only protected by state laws.

Secondly, the Court said Davis had *no right to privacy* from the disclosure of the fact that he had been arrested for shoplifting. Justice Rehnquist said that he and the other members of the majority did not want to include reputation along with marriage, reproduction, contraception, family relationships, and child rearing and education, in the zone of privacy protected by the Constitution. The right to a good reputation, said the majority, was not as important, or *fundamental*, as were these other areas protected by the right to privacy.

Thus, Davis could not claim that his right to privacy was violated by the flyer unless there was a law which specifically prohibited this. Since there was none, Davis would have to go to state court to sue Police Chief Paul for libel in order to obtain any money damages.

The three dissenting justices wrote that there was a need for some form of constitutional protection against allowing police officials, acting in their official capacities, to "constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society."

These three felt that there was no difference between this case and one where police officials broke into the home of a citizen, manacled and threatened the owner, and searched his home during the course of a narcotics investigation. In both cases, according to the dissenters, state officials were acting in their official role, and in both cases the innocent citizens' right to privacy and due process had been violated.

It was the dissenters' opinion that a person's reputation, being "one of the most cherished of rights enjoyed by a free people," was protected by the "liberty" provisions of the Fifth and Fourteenth Amendments. The dissenters felt that by branding Davis a criminal and by imposing some form of punishment without ever proving him guilty of an offense, Police Chief Paul had deprived Davis of his constitutional rights. The logic of the majority's opinion, said these justices, would allow a police official to randomly pick names from the telephone book and include them in the flyer as "active shoplifters." In the opinion of the dissenting justices, that would be intolerable.

How to Use a Law Library

An excellent, step-by-step article on the use of law libraries is available by writing the Constitutional Rights Foundation. Single copies, 50c, including postage. Sets of 10 or more, 25c each, plus postage.

Bill of Rights — In Action

The *Bill of Rights In Action* is published four times per school year, in September, November, February and April. Each 24-page issue will be developed around a single theme. Annual subscription rate will be $4.00. Class sets of 35 will sell for $10.00. Four issues in sets of 15 or more, $1.10 per student.

February and April Topics

February —*Youth and the Police*
The problems of law enforcement and the relationship between youth and the police will be dealt with. The issues will include classroom simulation and other activities.

April — *Moral Education and Law Studies*
The relationship between the work of Lawrence Kohlberg, James Rest and law studies will be explored. Classroom activities designed to stimulate moral development through law education will be included.

Newsletter — Back Issues

Youth, the Police and Society. Fall, 1971. 16 pp.
Youth and the Right to Vote. Spring, 1972. 16 pp.
Sex and Equality. Fall, 1972. 16 pp.
Crime, Violence and American Youth. Spring, 1973. 24 pp.
Power of a Free Press. Fall, 1973. 32 pp.
Justice in America: Fact or Fiction? Spring, 1974. 32 pp.
Rights of Children. Fall, 1974. 32 pp.
Crime, Confinement and Corrections. Spring, 1975. 32 pp.
American Schools in Crisis. Fall, 1975. 32 pp.
Challenge of American Ideals. Spring, 1976. 32 pp.
Politics — U.S.A. Fall, 1976. 24 pp.

Sets of 35, $5.00 (16 pp. issues); $10.00 (all others) from Social Studies School Services, 10,000 Culver Blvd., Culver City, California 90230.

Student Materials

Police Patrol
Role-playing simulation on the role of police is available as a kit from Simile II for $12.50. 1150 Silverado, La Jolla, California 92037.

Jury Game
A role-play simulation on the jury selection process is available as a kit from Social Studies School Service for $15.00; estended kit, $22.00. 10,000 Culver Boulevard, P.O. Box 802, Culver City, California 90230.

Kids in Crisis
A role-playing simulation on the juvenile justice system available for $32.50 from: Social Studies School Service, 10,000 Culver Boulevard, P.O. Box 802, Culver City, California 90230.

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